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In The Supreme Court of the United States

October Term 1998

ANN DOE AND JOHN DOE,
parents and next friends of TOM DOE,
Petitioners,

v.

BOARD OF EDUCATION
OF BALTIMORE COUNTY,
a Body Corporate and Politic of the State
of Maryland; ANTHONY G. MARCHIONE,
Officially, Superintendent,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTION PRESENTED

Whether the Supreme Court's decision in *Kay v. Ehrler*, 499 U.S. 432, 1111 S. Ct. 1435, 113 L.Ed. 2d 486 (1991) should have been expanded to preclude the prevailing parties under an IDEA cause of action, who obtained full reimbursement for their "formerly autistic" child's educational program and at the same time achieved a systemic change that resulted in the defendant school district providing that program to other families with autistic children, from recovering costs including attorneys fees and reasonable litigation expenses, solely because the attorney was also the child's parent?

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PETITION FOR A WRIT OF CERTIORARI

Ann Doe and John Doe, parents and next friends of Tom Doe Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 165 F.3d 260. The opinion of the district court is unpublished and is reprinted at App. A-12 through A-16.

JURISDICTION

The Fourth Circuit Court of Appeals entered its judgment on December 10, 1998. Motion for Rehearing and Reconsideration was timely filed. That motion was denied on January 5, 1999. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. Section 1254(1). Subject matter jurisdiction provides for judicial review and review of IDEA disputes.
Appellate jurisdiction exists as a matter of right. 28 U.S.C. § 1291 and FRAP 4. Judgment of the court of appeals was entered on December 10, 1998. Jurisdiction in this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Individuals with Disabilities Education Act ("IDEA"), Part B, 20 U.S.C. § 1400 *et. seq.*, specifically 20 U.S.C. § 1415 (e)(4)(B) provides in relevant part:

> . . . (B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys'

> fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party. . .

28 U.S.C. § 1920 providing for taxation of fees and costs

STATEMENT OF THE CASE

A. Nature of case

Tom Doe is a young boy (Date of Birth January 10, 1992) who, shortly before his third birthday, was diagnosed as suffering from autism. His mother, Ann Doe, took immediate steps to have Tom Doe enrolled in the Baltimore County Public School's ("BCPS") Infants and Toddler program. Simultaneously, Mrs. Doe discovered a nationally known program for educating autistic children. That program, referred to as the "Lovaas" program, established by empirical evidence that on the average, 47% of autistic children entering the program at Tom Doe's age of entry achieved normal functioning by the age of six and progress through the regular public school program, passing from grade to grade and achieving results comparable to non-disabled peers through high school without the need for further special educational services.

Upon implementing the Lovaas program for Tom Doe and achieving immediate, remarkable progress, Mrs. Doe sought to have BCPS adopt that program and provide funding for that program. BCPS refused the Doe family's request to fund Tom Doe's Lovaas program. Being unable to afford the costs of Tom Doe's Lovaas program, attorney's fees and court costs, the Doe family sought to retain five different "special education law" attorneys on a contingency basis. These efforts were unsuccessful.

In refusing the Doe family's request to fund Tom Doe's Lovaas program, BCPS chose to make a test case in hopes that, if they prevailed, they could avoid the expense of

this program county wide. In making that choice, BCPS considered the fact that Tom Doe's attorney was also his father. This was significant, as an earlier decision out of the District Court in Baltimore carved out an exception to the applicable law. Normally, when the child is the prevailing party, attorney's fees are awarded as part of the recoverable costs of the cause of action. The exception established that a parent/attorney could not recover attorney's fees, even if he prevailed on the child's behalf. BCPS opportunistically, elected to exhaustively litigate this test case looking to assert the above noted "parent exception" in the event they lost.

In fact, BCPS did loose. To date, BCPS has been successful in asserting the above noted "parent" exception. Based on the District Court decision below, it appeared that the Court, perhaps as a mere oversight, expanded the "parent exception" by also denying recovery of costs and expenses associated with successfully pursuing and enforcing Tom Doe's due process rights.

A timely appeal was filed. Oral argument took place on October 27, 1998. In the published opinion written by Judge Motz, in which Judge Hamilton and Chief Judge Boyle joined, the Fourth Circuit affirmed the District Court decision.

Appellant timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc which was denied by Order entered on January 5, 1999, however an amended opinion was issued by the court substituting the parties true names with anonymous names for the protection of the child's privacy.

B. Course of Proceeding

Disagreeing with Defendants' position that they had offered her autistic son, Tom Doe, a Free Appropriate Public Education and Defendants' refusal to adopt and provide funding for his Lovaas program, Mrs. Doe, through her attorney, filed a petition seeking a Due Process Hearing.

Because Plaintiffs did not provide Defendants with notice regarding their witnesses until four days before the initial Due Process hearing, rather than five days, Defendants objected when Plaintiffs attempted to present testimony through those expert witnesses. The objection was sustained and that testimony was not presented.

The initial Due Process hearing concluded in one day and the Hearing Officer ruled in favor of Defendants.

Plaintiffs appealed that decision to the Office of Administrative Hearings. The case was zealously litigated by Defendants' counsel. The appeal resulted in five days of taking evidence and hearing motions, during which Plaintiffs were able to present expert testimony in their case to the Hearing Review Board (HRB).

The evidence portion of the State Level Appeal Hearing was closed and counsel for the parties were again directed to submit written closing arguments. On July 3, 1996, the HRB entered its decision, reversing the decision of the Hearing Officer below and awarding Plaintiffs full reimbursement for Tom Doe's Lovaas program. After that decision became final beyond appeal and Defendants had not paid the reimbursement as directed, Plaintiffs filed a complaint in the U.S. District Court in Baltimore, seeking an enforceable judgment for the reimbursement ordered by the HRB and the recovery of litigation costs and expenses, including attorney's fees.

Although, Defendants admitted to liability for the reimbursement ordered, they denied liability for the costs and expenses associated with litigating the case.

In an effort to avoid any additional unnecessary litigation in this case, the parties agreed to stipulate to have the issue narrowed to the entitlement of attorney's fees. The stipulation requesting that the decision be limited to the issue of recovery of attorney's fees was rejected by then presiding judge, the late Honorable Frank Kauffman. Instead, he insisted that all issues be addressed. However, he did agree to resolve the matter by cross motions for summary

judgment, supported by affidavits, rather than an expensive trial. It was not until shortly before cross motions for summary judgment were to be submitted that Defendants acknowledged liability for Plaintiffs' expert witness fees. Defendants continued to deny liability for other costs related to litigating this case.

Cross motions for summary judgment with supporting affidavits were filed on or before May 31, 1997. Judge Kauffman died unexpectedly and the case was re-assigned to Judge Nickerson on August 13, 1997. On December 23, 1997, Judge Nickerson entered summary judgment awarding Plaintiffs the reimbursement ordered by the HRB, plus the expert witness fees to which Defendants admitted liability; and denying Plaintiffs' request for attorney's fees. The decision did not address the costs and other litigation expenses sought by Plaintiffs.

A timely appeal to the Fourth Circuit Court of Appeals was filed January 12, 1998.

C. Disposition of Courts Below

As noted above, on December 23, 1997, Judge Nickerson entered summary judgment awarding Plaintiffs the reimbursement ordered by the HRB, plus the expert witness fees to which Defendants admitted liability; and denying Plaintiffs' request for attorney's fees. The decision did not address costs and other litigation expenses sought by Plaintiffs, but erroneously indicated that the Court believed they had been resolved. The Fourth Circuit Court of Appeals heard oral argument on October 27, 1998 and on December 10, 1998 issued its Published Opinion affirming Judge Nickerson's decision. Plaintiffs filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc. The Fourth Circuit denied that motion on January 5, 1999 but did issue an Amended Published Opinion substituting the fictitious name of Doe in an effort to protect the child Plaintiff's privacy.

REASONS FOR GRANTING THE WRIT

Ninety nine plus percent of all school districts in the United States play the equivalent of Russian Roulette with each child in their population afflicted by autism? They also load every chamber of the Roulette pistol? Their version never results in death but ninety eight percent of the time results in severe and permanent brain damage? Some in our judicial branches have found reasons to avoid correcting this atrocity and instead have chosen to turn a blind eye to view or a deaf ear to hear the anguish of these families.

In the case at bar, Tom Doe's parents, in a matter of two months educated themselves on the available treatments for autism. To their dismay they discovered that there was only one scientifically proven treatment. It is commonly referred to as a Lovaas program, named after the Dr. O. Ivar Lovaas, who developed the program and curriculum. It is a program that is avoided like the plague by ninety nine percent of the school districts in the United States. It is the program of choice by practically every parent of a young autistic child. It is the program that John and Ann Doe asked the school district of Baltimore County to provide for their then almost three year old autistic son Tom. It was the program the defendant school district rejected without a moments thought or consideration. Even as Defendant was made aware of its misperception of the program being synonymous with the plague, it steadfastly clung to its position that Russian Roulette (with a fully loaded gun) offered Tom an appropriate education. The determined Does have spent more than four years challenging the defendant school district's position in an effort to benefit similarly situated families. This is the end of that journey and this Court will determine whether autistic children will continue to be subjected to Russian Roulette or will be given the opportunity for a meaningful education and life.

I. Should John Doe Be Denied Attorney Fees Solely Because He Represented His Wife and Son?

It is both fortunate and unfortunate that Tom's father is an attorney. It is fortunate because when he exhausted all known sources for securing legal representation for Tom's case, he was able to bring the case on behalf of Tom and Ann Doe. As such, in April of 1995, John Doe initiated what ultimately became a successful challenge against the school districts game of Russian Roulette. The Does were awarded full reimbursement for their son's Lovaas program through the administrative process. When the defendant school district refused to remit the award, as an attorney admitted to the U.S. District Court of Baltimore, Tom was able to file a complaint there and recover an enforceable judgment. In addition to ultimately satisfying the judgment, the defendant school district also began providing the Lovaas program to some other families with young autistic children. While, the school district did not give up its Roulette pistol they did removed several rounds from the chamber.

It is also unfortunate that Tom's attorney was his father. Two and a half years after initiating his successful challenge, The District Court of Baltimore issued a decision denying the Does their litigation expenses, costs and attorneys fees solely because Tom was represented by his father. Figuratively speaking, the Court reloaded the Roulette pistol and handed it back to the defendant school district. Continuing the challenge, John Doe appealed to the Fourth Circuit Court of Appeals. Three and a half years after initiating his successful challenge, the Fourth Circuit Court of Appeals affirmed the District Court's decision and delivered Roulette ammunition to every school district in the Fourth Circuit and any other Circuit choosing to allow its schools continue this atrocity against their population of autistic children.

In order to accomplish this result, the Fourth Circuit Court of Appeals had to engage in numerous and difficult

legal contortions. To reach their desired result, they had to dissect the case of *Kay v. Ehrler*, 499 U.S. 432, 1111 S. Ct. 1435, 113 L.Ed. 2d 486 (1991) (hereinafter *Kay*). In *Kay*, this Court held that a *pro se* litigant, even if he was an attorney, was not entitled to recover attorneys fees under the Civil Rights fee shifting statutes. The Fourth Circuit ignored the clear abuse concern that the *Kay* decision was designed to extinguish.[1] This was necessary because such abuse did not and could not exist in an IDEA case, as IDEA cases require a third party child (who could not be a licensed attorney), diagnosed by third party doctors, as suffering from an objective and medically defined disability. They ignored the underlying policy considerations of making the prevailing family whole, as such policy supports the Doe's right to recover costs and fees under the IDEA rather than the Court's decision to deny recovery. They ignored the agency factor that concerned the *Kay* Court because it existed in the case at bar. They acknowledge that John Doe's representation of his son and wife was not *pro se* and rejected Defendant's absurd argument that it was *pro se* writing:

> For these reasons, we cannot agree, as the Board urges, that Mr. Doe is acting pro se in pursuing his son's IDEA claim, in the same fashion as Mr. Kay was in advancing his own civil rights claim. Thus, *Kay v. Ehrler* does not precisely parallel this case. *Doe v. Board of Educ. Of Baltimore*, 165 F.3d 260, at 263 (4th Cir. 1998) (hereinafter *Doe*).

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[1] The obvious abuse that was extinguished in the *Kay* case was the ability of an attorney to generate a civil rights cause of action wherein he made himself the "victim", prosecute that case and then seek to recover attorney fees for a technical victory.

The Fourth Circuit cited[2] and then ignored their own, as well as established Supreme Court[3], Fifth Circuit[4] and Ninth Circuit cases establishing that under circumstances such as the case at bar, courts are obligated to liberally interpret the fee shifting statutes to allow for an award of costs and attorneys fees and it is only in the extreme and unjust circumstance that the court is allowed to deny fees. Consistent with those cases, the *Doe* Court also acknowledged that the IDEA fee shifting provision is to be interpreted and applied as the Civil Rights fee shifting

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[2] Courts have universally recognized that this "special circumstances" exception is very "narrowly limited." *See, e.g., Bonnes v. Long*, 599 F.2d 1316, 1318 (4th Cir. 1979), *overruled on other grounds by S-1 & S-2 v. State Bd. of Educ.*, 21 F.3d 49, 51 (4th Cir. 1994). Only on rare occasions does a case present such circumstances, *see, e.g., Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040, 1044-45 (4th Cir. 1976), **and we have uncovered no case in which any circuit has found a basis for the special circumstances exception in a situation similar to that at hand.** *Doe* at 264 (Emphasis added).

[3] . . . the Supreme Court has recognized that although a prevailing party "should ordinarily recover an attorney's fee," "special circumstances" can render "such an award unjust." *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting *Newman v. Piggie Park Enters. Inc.*, 390 U.S. 400, 402 (1968)) (§ 1988); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975) (Title VII) (dicta). Although the Court has not discussed the special circumstances doctrine in connection with the IDEA fee-shifting provision, the legislative history indicates that Congress intended courts to interpret it as they have § 1988 and Title VII. *See* S. Rep. No. 99-112, at 13-14 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1798, 1803-04. *Doe* at 264

[4] In *State of Texas v. Interstate Commerce Commission*, 935 F.2d 728 (5th Cir. 1991), which was decided three months after *Kay*, the Fifth Circuit held that "if a FOIA plaintiff has actually and reasonably incurred legal fees that is, a lawyer has handled his case, even if the lawyer is the plaintiff himself and if the plaintiff substantially prevailed, he may recover reasonable attorneys fees from the federal government, provided that the court finds that the four discretionary criteria are satisfied." Id. at 731-32 (footnote omitted).

provisions. Again and again, the Court espoused correct law in its decision only to disregard it.

The Ninth Circuit issued two decisions that if applied by the *Doe* Court, would have resulted in the opposite result. The first was the case of *Collins v. Chandler Unified School District*, 644 F.2d. 759 (9th Cir. 1981). The *Collins* court wrote:

> The question, then, is whether Collins' status as a parent-litigant is a special circumstance sufficient to render an award unjust.
>
> As Collins argues, **the plain language of section 1988 provides no exception based on a litigant's status as a parent**. The statute simply provides that in *any* action to enforce section 1983 rights the court may award fees to *the* prevailing party. The language "is broad and unequivocal", *Dennis v. Chang*, 611 F .2d. 1302, 1305 (9th Cir. 1980), and must be liberally construed to achieve Congress' purpose "to encourage compliance with and enforcement of the civil rights laws." *Id.* at 1306; *see Leeds v. Watson*, 630 F.2d 674, 677 (9th Cir. 1980); *Mid-Hudson Legal Services, Inc. G & U, Inc.*, 578 F.2d 34, 37 (2d Cir. 1978).

Collins, *supra*, at 763 and 764. (**Emphasis added**)
Collins is clearly analogous. However, since Ms. Collins was not a parent/attorney, the Fourth Circuit apparently concluded that this case was not on all fours and did not warrant discussion.

The second Ninth Circuit decision was the case of *Abu-Sahyun v. Palo Alto Unified Sch. Dist.*, 843 F.2d 1250, 1253 (9th Cir. 1988). Since *Abu-Sahyun* dealt precisely with the "special circumstances" doctrine upon which the Fourth

Circuit was relying in denying the recovery of attorneys fees, it was mentioned by the *Doe* Court in footnote 2.

> [2] Prior to *Kay*, the Ninth Circuit suggested that determination of whether "special circumstances" exist in an IDEA case involves examination of "two factors: (1) whether awarding fees would further the congressional purpose in enacting" IDEA and "(2) the balance of the equities." *Abu-Sahyun v. Palo Alto Unified Sch. Dist.*, 843 F.2d 1250, 1253 (9th Cir. 1988). Neither the Supreme Court nor this court has embraced this two-part test in subsequent IDEA cases and we decline to do so here. This "test" contains no real standards and provides no legitimate reason for departing from the usual rule of awarding reasonable fees to prevailing plaintiffs under fee-shifting statutes. *Doe* n.2 at 264.

The last sentence of that footnote is perplexing because the "test" contains the policy standards discussed at length by the *Kay* Court. It also embodies the equitable standards established by the cases to which the *Doe* Court referred in the opinion's immediately preceding paragraph when they wrote:

> . . . In the context of other fee-shifting provisions, *e.g.*, those in 42 U.S.C. § 1988 and Title VII of the Civil Rights Act of 1964, the Supreme Court has recognized that although a prevailing party "should ordinarily recover an attorney's fee," "special circumstances" can render "**such an award unjust**." *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting *Newman v.*

> *Piggie Park Enters. Inc.*, 390 U.S. 400, 402 (1968)) (§ 1988); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975) (Title VII) (dicta). Although the Court has not discussed the special circumstances doctrine in connection with the IDEA fee-shifting provision, the legislative history indicates that Congress intended courts to interpret it as they have § 1988 and Title VII. *See* S. Rep. No. 99-112, at 13-14 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1798, 1803-04.
> *Doe* at 264 (Emphasis added).

The first part of the *Abu-Sahyun* test, (1) whether awarding fees would further the congressional purpose in enacting" IDEA complies with the *Kay* decision wherein the Supreme Court declined to award Mr. Kay his fees because it would have been contrary to the congressional purpose. The second part of the *Abu-Sahyun* test, (2) "the balance of the equities" appears to be taken from the *Hensley, supra* decision requiring the award to be unjust before it could be denied.

In *Doe*, the Defendant school district never argued or suggested that the award of costs and attorney fees would be unjust. The facts only support the opposite argument, that it would have been unjust to deny Plaintiffs their costs and attorney fees. Judge Motts acknowledged during oral argument that but for the fact that Tom's father was an attorney, since he was unable to secure other counsel, he would not have been able to acquire in the district court, the enforceable judgment in Tom's favor. Her statement was founded on the two recent decisions brought to the Court's attention by Appellants. In the cases of *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123 (2nd Cir. 1998); and *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576, 581-82 (11th Cir. 1997), *cert. denied* , 118 S. Ct. 1040 (1998), the courts essentially held that by definition, a parent may not represent his child in a *pro se* capacity. However, rather than applying

these cases to support the policy of liberal application in awarding fees, the *Doe* Court used these two cases only to point out the error in Defendant's argument that John Doe's representation of his son Tom and wife Ann was *pro se*. The *Doe* Court wrote:

> . . . the child, not the parents, is the real party in interest in any IDEA proceeding. . . Recognizing that parents and children are distinct legal entities under the IDEA, the Second and Eleventh Circuits have recently held that parents who are not attorneys may not appear pro se in court on behalf of their children in IDEA cases. *See Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123 (2nd Cir. 1998); *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576, 581-82 (11th Cir. 1997), *cert. denied* , 118 S. Ct. 1040 (1998). *Doe* at 263.

It is also clear from the *Doe* Court's decision that Plaintiffs' case was strongly supported by the underlying policies of the IDEA and all of the equitable considerations fell against Defendants and in favor of Plaintiffs. That would account for their statement:

> . . . This [two part] "test" contains no real standards and provides no legitimate reason for departing from the usual rule of awarding reasonable fees to prevailing plaintiffs under fee-shifting statutes. *Doe* n.2 at 264

This statement indicates that the Court was searching for a "legitimate" reason to deny fees in this case. Plaintiffs contend such legitimate reason was never found. Otherwise, the Court would have relied on *Hensley, supra* to deny recovery based on special circumstances rendering such an

award unjust or *Kay* to deny recovery because the award would be contrary to the Act's underlying policy.

The child in this case was awarded full reimbursement from the school district. The case resulted in a systemic change wherein the school district began offering the child's educational program to other similarly situated children suffering from autism. The school district made a calculated decision to make this a test case. They applied extensive resources to the fight. They were willing to gamble that if they lost, which they did, the Court might deny the fee recovery based upon a determination that John Doe's representation of his son was *pro se*. After rejecting Defendant's argument, the Fourth Circuit invented its own reason to deny Plaintiffs their right to recover costs, litigation expenses.

To do this, the *Doe* Court was required to dissect the *Kay* opinion. After dissecting the *Kay* decision, only one issue, "encouraging independent representation," remained as potential support for the *Doe* Court's decision. To accomplish the desired result required creativity. The *Doe* Court first had to contort the issue beyond the facts of *Kay*. Second, the issue had to be given piecemeal application. The *Kay* Court concerned itself with creating an incentive or encouraging parties to obtain independent representation and discouraging or creating a disincentive to proceeding *pro se*. Exercising creative license, the *Doe* Court redefined "incentive" and "encourage" to mean "mandatory". Such disregard for the *Kay* Court's carefully chosen words and their plain meaning is contrary to rules of construction requiring application of the plain meaning of words. *See*: *Kmart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S. Ct. 1811 (1988).

Obviously, the *Doe* Court recognized that the Does had unsuccessfully exhausted all known potential sources of alternate representation.[5] The Court also recognized that this

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[5] See paragraph 9 of the Affidavit of John Doe Fourth Circuit Joint Appendix page 56 (cited herein as 4th Cir. Joint App Page #).

may have been due to the fact that the defendant school district had chosen to make this a test case. Nevertheless, they concluded:

> But, nothing in *Kay* suggests that the **difficulty** of a case or the **failure to find other counsel** provide a ground for awarding fees to a prevailing pro se attorney-plaintiff. Moreover, contrary to the Does' suggestion, the *Kay* Court specifically refused to base its rationale on a need to eliminate abusive or meritless claims. Thus, we cannot deduce that when an attorney advocates a nonabusive claim, a different result is mandated. *Doe* at 265, (Emphasis added).

This portion of the decision demands scrutiny. The ground for awarding costs and fees is the fee shifting provision of the IDEA (20 U.S.C. § 1415 (e)(4)(B)) which awards costs and fees to the prevailing party. To deny the fee, the Court is required find a legitimate reason as to why the award would be unjust or contrary to the IDEA's legislated purpose. See *Doe*, at 264. The Court's next statement:

> . . . Moreover, contrary to the Does' suggestion, the *Kay* Court specifically refused to base its rationale on a need to eliminate abusive or **meritless claims**. *Doe* at 265 (Emphasis added).

contradicts the Court's earlier statement:

> Yet *Kay* clearly does have relevance here. After all, the **central thrust** of *Kay* is that fee-shifting statutes are meant to encourage the effective prosecution of **meritorious claims**, . . . *Doe* at 263 (Emphasis added).

If "the *Kay* Court specifically refused to base its rationale on a need to eliminate abusive or meritless claims," there would be no reason for the *Kay* Court to conclude their decision with:

> . . . The statutory policy of furthering the successful prosecution of **meritorious claims** is better served by a rule that creates an incentive to retain counsel in every such case. *Kay* at 438 (Emphasis added).

Finally, the *Doe* court asserts:

> Thus, we cannot deduce that when an attorney advocates a nonabusive claim, a different result is mandated. *Doe* at 265.

These statements reek with illegitimacy. Arguably, justice mandates a different result when an attorney advocates a nonabusive and meritorious claim. Alternatively, the Court could have relied on *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting *Newman v. Piggie Park Enters. Inc.*, 390 U.S. 400, 402 (1968)) (§ 1988); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975) (Title VII) (dicta). The *Doe* court cited these cases in its decision without distinguishing them from the case at bar. *Doe* at 264.

Contrary to the *Doe* Court's ambiguous "*Kay* rationale" test, the *Kay* Court intentionally chose to apply a specific "bright line" test in denying the award of fees. Based on *Kay*, fees (not costs) may be denied to pro se litigants, whether they are attorneys or not. The *Kay* Court could have established the rolling pin expression of the "*Kay* rationale" for lower courts to use in painting their decision but for obvious reasons chose restrictive language. The carefully chosen language left minimal room for interpretation. That is the nature of a bright line standard and its application. Plaintiffs understanding has generally

been accepted among the courts applying *Kay*. Except for the Fourth Circuit below in *Doe*, and the D.C. Circuit in *Burka v. United States Department of Health and Human Services, et al.*, 142 F. 3d 1286 (D.D.C 1998) (hereinafter *Burka*), every Circuit Court that has applied the *Kay* doctrine has restricted its application to pro se litigants. The *Burka*, Court expanded *Kay* as follows:

> For the foregoing reasons, we hold that a pro se attorney- litigant is not entitled to attorney's fees under FOIA, 5 U.S.C. § 552. We also hold that this **rule applies** even if the pro se attorney-litigant claims to in fact represent an **undisclosed client**. Finally, we hold that a pro se attorney-litigant is not entitled to an award of attorney's fees for **work performed by other attorneys on the case where the other attorneys worked in the attorney-litigant's firm** under the attorney-litigant's direction. *Burka*, at 1292 (Emphasis added)

Excluding *Burka* and *Doe*, the only U.S. District Court that has attempted to expand the *Kay* doctrine beyond the pro se litigant is the U.S. District Court of Maryland, Baltimore Division in the case of *Rappaport v. Vance*, 812 F. Supp. 609, (D. Md. 1993) *appeal dismissed*, 14 F.3d 596 (4th Cir. 1994). The *Rappaport* decision was also cited as persuasive authority by the Supreme Court of Indiana in *Miller v. West LaFayette Community Sch. Corp.*, 665 N.E.2d 905 (Ind. 1996) in its decision to reverse the Indiana Court of Appeals award of attorney fees to Mr. Miller, an attorney/parent who prevailed in his child's IDEA cause of action.

With the uniform application of fee shifting statutes, if the Fourth Circuit decision in *Doe* is not reversed, it will be used by courts throughout the United States to deny the recovery of costs and attorney fees at this newly established unfettered discretion of the court. It is obvious that no

attorney can be completely independent when it comes to handling a case. Thus, every attorney will be subject to a denial of costs and fees under the new *Doe* expansion of *Kay*. Surely the *Kay* Court never intended to allow its decision to be applied in such a manner.

The *Doe* and *Burka* decisions will have more than a chilling affect. As more and more courts adopt them it will have a stifling or suffocating affect. Any attorney contemplating taking a case from a client relying on the fee shifting provisions of an act such as the IDEA, Civil Rights, Freedom of Information, Equal Access to Justice Act or other a similar acts will be compelled to advise his client that the costs and fees may be denied at the sole and unfettered discretion of the court. It will result in closing the courthouse doors to all but the most wealthy Americans. Those Acts, while not excluding the wealthy, were designed to provide access to the courts for the less affluent whose rights have been trampled. See *Kay* n.8 at 437.

Rather than open the courthouse doors as envisioned by the fee shifting provisions of the Acts, the *Doe* decision slammed those doors on the attorney's and clients' fingers in order to open the door for the future denial of cost and fees. The Fourth Circuit began painting with a broad brush when it initially chose to deny fees based on the potential lack of independence. Next, it decided to broaden the stroke by adding to the potential for denial what the Court referred to as a "special and close relationship." With that work of art the *Doe* Court covered every attorney in the world. Though the *Doe* Court initially discussed the "special and close relationship" in relation to parents, the Court did not attempt to limit it application to parents. To the contrary, it immediately expanded its newly developed exception to cover "similar" circumstances writing:

> We note that the district judge in this case, another distinguished district judge in this circuit, and the Indiana Supreme Court have

reached a **similar conclusion**. *Doe* at 264 (Emphasis added)

Apparently concerned with the possibility of over application to deny the recovery of fees, the *Kay* Court chose precise language to provide a narrow application. In an exercise of over application to deny the recovery of fees, the Fourth Circuit in *Doe* chose broad language. This set the stage for an unlimited range of application for future cases. By refusing to limit the language to parents, the *Doe* Court created the possibility that its holding could be applied to prohibit the recovery of fees for an attorney relative of any degree of kinship. The decision would support a denial of costs and fees to an attorney that may have lost his absolute objectivity or independence through handling other similar cases. It would also support the denial of fees to an attorney that may have lost his absolute objectivity or independence through becoming acquainted with the case.

Surely the *Kay* Court considered these potentially devastating applications when it chose to establish the bright line *pro se* standard rather than leave it to the arbitrary application of the sitting judge standard. The *Doe* Court's application of *Kay* to deny the recovery of costs and fees will have its most immediate stifling affect in IDEA cases but it is not limited to IDEA cases. It will choke off what is arguably the single greatest source for private attorneys general to handle special education cases, attorney/parents[6]

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[6] Said attorneys have names like Peter W. D. Wright, Martin Kotler, Stanley Miller, Nolan Rappaport, Joseph Kattan, Shelli and Ralph Lewis, Kathryn E. Dobel, Frank A. Johns, George (Pete) Clary, Stacy Bawtinhimer, Mark Williamson and most recently, John Doe. These are the Private Attorneys General who, although they are parents of special needs children, have proven, and continue to prove that, with a large measure of perseverance, David may reform Goliath with God's help.

See: **Peter W. D. Wright,** *Florence County School Dist. Four v. Carter*, 114 S.Ct. 361 (1993); **Martin Kotler**, *Delaware County Intermediate Unit #25 v. Martin & Melinda K.*, 831 F. Supp. 1206 (U.S. E.D. Penn. Sept. 15, 1993); **Stanley Miller**, *Miller v. West Lafayette*

of special needs children. Such policy destruction begs to be corrected.

Reviewing decisions applying the *Kay* doctrine, it is Plaintiffs desire that the Supreme Court take this opportunity to further restrict *Kay's* application to *pro se* attorney-plaintiffs rather than *pro se* attorney-litigants. This will re-establish the protections previously available to a *pro se* attorney-defendants such as Mr. Richard Kauffman in *S.E.C. v. Waterhouse*, 41 F.3d 805 (2nd Cir. 1994) who had to spend five years defending himself against the Securities Exchange Commission before they voluntarily dismissed him from the cause of action.

II. Recovery of Costs and Litigation Expenses

The last but not least significant error made by the *Doe* Court was their refusal to award costs and litigation

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Community School Corp., 645 N.E.2d 1085, 21 IDELR 1176 (Ind. Ct. App. 1995), rev., 24 IDELR 174 (Ind. May 28, 1996); **Nolan Rappaport**, *Rappaport v. Vance*, 812 F. Supp. 609, (D. Md. 1993); **Joseph Kattan**, *Kattan v. District of Columbia*, 18 IDELR 296 (D.C. Cir. 1991) and *Kattan v. District of Columbia*, 301 U.S. App. D.C. 374, 995 F.2d 274, 278 (D.C. Cir. 1993), cert. denied, 128 L.Ed.2d 71, 114 S.Ct. 1398 (1994) LRP 441:207, 691 F. Supp. 1539 (D.C. Cir. 1988); **Shelli and Ralph Lewis**, *Capistrano Unified Sch. Dist.*, 23 IDELR 1209 October 23, 1995; *See also*: 2 ECLPR ¶ 187; **Kathryn Dobel**, *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 20 IDELR 987,1 ECLPR ¶ 364 (9th Cir. 1994); **Frank A. Johns**, *S-1 v. State Bd. of Educ. of N.C.*, 6 F.3d 160 , 20 IDELR 609 (4th Cir. 1993); *reh.*, 21 F.3d 49, 20 IDELR 1447, (4th Cir. 1994); 23 IDELR 381; *Glen III v. Charlotte-Mecklenburg Sch. Bd. of Educ.* No. 3:94CV189-P; (U. S. D. N. C. 1995); *see also*:18 IDELR 1307; **George R. Clary, III**, *Winston-Salem/Forsyth County Schools*, 25 IDELR 366, No. 96 EDC 0349 (Nov. 18, 1996); **Stacy Bawtinhimer** *Craven County Bd. of Educ.* No. 96 EDC 0421, 27 IDELR 235 (May 29, 1997); *Craven County Bd.* of Educ. No. 96 EDC 0655, 27 IDELR 255 (Oct. 27, 1997); **Mark Williamson, John Doe**, *Baltimore County Public Schools*, 2 ECLPR ¶ 231 (July 3, 1996) the case at bar, below; *In Re: G.*, 27 IDELR 451, (Dec. 24, 1997), (See: Affidavits 4th Cir. Joint App. 45-59 & 61-64).

expenses. From a national perspective, since parents are authorized under the IDEA to proceed through the Administrative Process representing their child, it should be made clear that, contrary to the District Court's and Fourth Circuit 's decisions in *Doe*, such prevailing families will be entitled to an award of their litigation expenses and costs. Prior to the *Doe* decision, there was no basis for an *in toto* denial of the recovery of costs and litigation expenses to the prevailing family in an IDEA case. Compared to the magnitude of saving autistic children from the school districts version of Russian Roulette, the $7,192.72 of costs and litigation expenses Plaintiffs are seeking to recover may seem insignificant. However, applying the blanket denial to every due process petition filed in the United States, magnifies the significance of this issue to the point that it becomes astronomical.

The Fourth Circuit, focusing its decision on the issue of a parent/attorney's right to recover attorney fees spent little time on the issue of costs and litigation expenses. In the process of glossing over this issue the Court wrote:

> . . . Similarly, although the Does seek costs and pre- and post-judgment interest on appeal, they did not properly advance or preserve these rights in the district court. More experienced counsel would likely have alleged the right to interest in the complaint and **sought costs pursuant to 20 U.S.C. § 1415(e)(2)**. *Doe*, at 263 (**Emphasis added**).

With all due respect, this is an odd assertion as the opening paragraph of the Complaint states:

> [Plaintiffs] bring this **complaint for attorneys fees and costs** incurred in pursuing their due process rights in seeking and obtaining an decision in their favor in regards

to their autistic son pursuant to an appeal of an administrative decision to a Maryland State Department of Education Hearing Review Board which rendered a decision in favor of Plaintiffs on or about July 3, 1996. (4th Cir. Joint App. 4) **(Emphasis Added)** . . .

. . . **JURISDICTION**

This Court has jurisdiction pursuant to the Individuals with Disabilities Education Act ("IDEA"), 84 Stat. 175, as amended, **20 U.S.C. § 1400 *et seq.*** (1988 ed. and Supp. IV); 34 Code of Federal Regulations (CFR) § 300.1 *et seq.*; Md. Educ. Code Ann., § 8-401 *et seq.* (1989); and Code of Maryland Regulations (COMAR) 13A.05.01. (4th Cir. Joint App. at 5) **(Emphasis Added)** . . .

. . . **RELIEF SOUGHT**

WHEREFORE, plaintiffs respectfully request that this Court:

1. ISSUE judgment for Plaintiffs against Defendants for $10,421.36 pursuant to the HRB decision below;
2. ORDER the Defendants to reimburse the Plaintiffs for **attorneys' fees, costs and expenses related to the administrative proceedings below (including but not limited to expert witness fees and travel costs) and this action**; and
3. **ORDER such further relief as the nature of this cause may require.**

(4th Cir. Joint App. 8) **(Emphasis Added)**.

Plaintiffs contend their Complaint was in accord with Rule 8(a) F.R.Civ.P., and contrary to the Fourth Circuit's conclusion, it properly advanced and preserved the right to recover the costs in the District Court.

The *Doe* Court asserted:

> . . . More experienced counsel would likely have alleged the right to interest in the complaint and sought costs pursuant to 20 U.S.C. § 1415(e)(2). *Doe* at 263.

That statutory section has little or nothing to do with costs. Rather than providing for the recovery of costs, section 1415(e)(2) provides part of the basis for the District Court's jurisdiction in the case. This section was incorporated by Plaintiffs' reference to 20 U.S.C. § 1400 *et seq.*, in their statement of Jurisdiction as noted above. The only portion of that section that deals with relief is the last sentence which provides that the court "shall grant such relief as the court determines is appropriate." The third numbered paragraph of the Relief portion of Plaintiffs' Complaint requested that the court "ORDER such further relief as the nature of this cause may require." (4th Cir. Joint App. 8) Surely the Court is not suggesting that such request should have been followed by a reference to 20 U.S.C. § 1415(e)(2). After all, we are in a notice pleading forum.

In addition to preserving Plaintiffs' right to recover costs in the Complaint, Plaintiffs' specifically addressed this issue in their Motion for Summary Judgment in the District Court as well as in their briefs below.[7] The only section of

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[7] *See generally*: 28 U.S.C. § 1920; *Arons v. New Jersey State Bd. of Educ.*, 842 F.2d 58 (3d Cir. 1988) wherein the Court noted:

the IDEA (pre reauthorization) that mentioned costs was 20 U.S.C. 1415(e)(4)(B) and there it is in relation to the recovery of attorneys fees. That section was specifically referred to in Plaintiffs' Motion for Summary Judgment and in Appellants' Brief on pages 2, 8-10, 12, 21, 33, 34 and referenced by the *Doe* Court in its decision at page 263. Accordingly, Plaintiffs contend the issue of costs was properly preserved.

Admittedly, pre and post judgment interest were not specifically mentioned in the Complaint. However, pre-judgment interest was specifically requested in the closing argument at the Hearing Review Board level.[8] Plaintiffs did not become aware of this omission in their Complaint until Defendant remitted payment after Plaintiffs' obtained an executable judgment. At that point, Plaintiffs were in the process of filing their Notice of Appeal. Therefore, Defendant was on notice that Plaintiffs were seeking pre and post judgment interest. Accordingly, that issue was also preserved.

By the time cross motions for summary judgment were filed in the District Court below, the only remaining unresolved issues were the right to recover attorneys fees

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> The Conference Committee Report explains, "[t]he conferees intend that the term 'attorneys fees as part of the costs' includes reasonable expenses and fees of expert witnesses **and the reasonable costs of any test or evaluation ... necessary for the preparation of the parent or guardian's case**. . . ." H.R. Conf. Rep. No. 687, 99th Cong. 1st Sess. (1986). (Emphasis added)

See also: 20 U.S.C. § 1415(e)(4)(B) and 1401(17) (prior to 1997 amendments) as "related services" which provide for recovery of medical services rendered for diagnostic and evaluative purposes); *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 1203 (4th Cir. 1990).

[8] See Page 54 of Closing Argument before the HRB attached to Petition for Rehearing and Suggestion for Rehearing En Banc below as Exhibit A.

under 20 U.S.C. § 1415(e)(4)(B), costs and litigation expenses. No Rule 54(d) motion was filed after Summary Judgment was entered as the District Court, had supposedly disposed of these by summary judgment. It would have been a waste of judicial resources to have the District Court refuse to grant these costs and litigation expenses in its Summary Judgment, only to have Plaintiffs counsel, within fourteen days, ask move for them again pursuant to Rule 54(d). There is no reason to impose such redundancy on our over crowded judiciary or the attorneys practicing before it. Such a motion would have justifiably invoked the District Court's ire. In addition, the recovery of those costs and fees was provided for by the IDEA.

As such, the exception in sub-paragraph (2)(A) to the general rule requiring a Rule 54(d) motion for costs to preserve their recovery is applicable. Rule 54(d)(2)(A) establishes: "Claims for attorneys' fees and related non-taxable expenses shall be made by motion **unless** the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial." (Emphasis added) The IDEA provides for the recovery of such fees and costs and they were the only remaining element of damages in the case before the District Court.

Even Mr. Kay, in his cavil but successful effort to have his name added to the ballot for the Presidency of the United States, recovered his non-attorney fees costs. *Kay v. Ehrler*, 111 S. Ct. 1435, 113 L.Ed. 2d 486 n.3 (1991). See also: *Demarest v. Manspeaker*, 948 F.2d 655, n.3 (10th Cir. 1991).

CONCLUSION

The *Kay* Court acted quickly and decisively in extinguishing the potential abuse made obvious by Mr. Kay. It was possible that no one else would pursue such an avenue of abuse. However, the Supreme Court wisely decided not

leave that to chance. With the *Doe* decisions below, as well as *Burka, supra, Rappaport, supra* and *Miller, supra* similar quick and decisive action is needed. This Court has the opportunity to turn Plaintiffs' $20,000 of private reimbursement and litigation expenses plus 700+ hours of work into one of the best investments our nation has ever experienced.

This case provides the opportunity to take one more step to end a national atrocity uniformly embraced and guarded by our school districts. It begins by holding school districts like Defendants below responsible for playing Russian Roulette with and permanently brain damaging every child with autism that was placed in their filthy hands. Thanks to his parents, Tom Doe was able to escape the Defendant's grasp. To date, due to the misguided decisions of the District Court and the Fourth Circuit Court of Appeals, it is likely that only a handful of children with autism have been spared due to the Doe's effort. Saving one more child's life would have made the effort worthwhile. Reversing the decision of the Fourth Circuit below will save the lives of similarly situated children throughout Fourth Circuit and the United States. If the Lovaas program is adopted and properly implemented, it will also save our country on the average $1,000,000+ per young autistic child that is provided this program of therapy.[9] Therefore, the Petition for Writ of Certiorari should be granted to provide the opportunity to achieve this strong underlying policy of the IDEA.

Respectfully submitted, this the 8th day of April, 1999.

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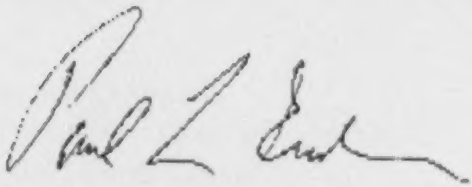
[9] O.I. Lovaas, *Behavioral Treatment And Normal Educational and Intellectual Functioning In Young Autistic Children*, Journal of Consulting and Clinical Psychology. (1987) pgs. 81-87 at 87. (4th Cir. Joint App. 71) See also: Jacobson, Mulick and Green, *Cost-Benefit Estimates for Early Intensive Behavioral Intervention for Young Children with Autism - General Model and Single State Case*, Journal of Behavioral Interventions, 13, 201-226 at 212 & 213 (1998)

THE LAW FIRM OF PAUL L. ERICKSON, P.A.



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AMENDED OPINION
PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ANN DOE AND JOHN DOE,
parents and next friends of TOM DOE,*
Plaintiffs-Appellants,

v.

BOARD OF EDUCATION OF BALTIMORE COUNTY,
a Body Corporate and Politic of the State of Maryland;
ANTHONY G. MARCHIONE, Officially, Superintendent,
Defendants-Appellees.

No. 98-1075

Appeal from the United States District Court
for the District of Maryland, at Baltimore.

William M. Nickerson, District Judge.

(CA-96-3734-WMN)

Argued: October 27, 1998
Decided: December 10, 1998
Entered: December 10, 1998

Before HAMILTON and MOTZ, Circuit Judges, and BOYLE, Chief United States District Judge for the Eastern District of North Carolina, sitting by designation.

Affirmed by published opinion. Judge Motz wrote the opinion, in which Judge Hamilton and Chief Judge Boyle joined.

*At the appellants' request, throughout we have substituted Ann Doe, John Doe, and Tom Doe for their real names.

COUNSEL

ARGUED: John Doe, THE LAW FIRM OF JOHN DOE, P.A., Asheville, North Carolina, for Appellants. Leslie Robert Stellman, BLUM, YUMKAS, MAILMAN, GUTMAN & DENICK, P.A., Baltimore, Maryland, for Appellees.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

This case presents the question of whether attorney's fees are to be awarded for the legal services performed by an attorney in obtaining special education benefits for his child under the Individuals with Disabilities Education Act. The district court held that there was no entitlement to fees in these circumstances. We affirm.

I.

Tom Doe is a child eligible for special education and related services under the Individual with Disabilities Education Act, (IDEA), 20 U.S.C.A. §§ 1400-1487 (West 1990 & Supp. 1998). His parents, Ann Doe and John Doe, sought to have local public school authorities provide the Lovaas behavioral modification program to Tom. After receiving an adverse decision from a state hearing officer, the Does appealed to the Maryland Office of Administrative Hearings. An appeal panel of that Office found in their favor. The panel concluded that the Lovaas program constituted an appropriate educational program for Tom and ordered that school officials reimburse Mr. and Mrs. Doe for their expenses in providing this program.

When the Board of Education of Baltimore County (the Board) failed to comply with that order, Mr. Doe, an attorney, and his wife filed this action as the "parents and next friends of" Tom Doe. The Board and the Does ultimately agreed that the Board would reimburse the Does in the amount of $10,421.36 for the Lovaas program and $2,012.50 for expert witness fees in the administrative proceedings. The Does also sought an award of attorney's fees for the legal services performed by Mr. Doe. The district court refused the request for attorney's fees, finding that when an attorney represents his own child in IDEA proceedings, the "congressional purpose in enacting the IDEA is best served by denying the award of fees." From that decision, the Does appeal.

II.

The Does sought attorney's fees under the fee-shifting provision of the IDEA, which has since been slightly, and immaterially, amended. The amended statute provides that

> [i]n any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party.

20 U.S.C.A. § 1415(e)(4)(B) (West Supp. 1998).

The Does maintain that the plain language of this statute permits an award of fees here, but the Board contends that the Supreme Court's decision in Kay v. Ehrler, 499 U.S. 432 (1991) prohibits such an award. Kay held that a pro se plaintiff who is an attorney cannot be awarded attorney's fees under the fee-shifting provision of the Civil Rights Attorney's Fees Awards Act, which contains language very

similar to the IDEA provision. See 42 U.S.C.A. § 1988(b) (West Supp. 1998) ("the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."). The Kay Court reasoned that the term "attorney" in the fee-shifting provision "assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under § 1988." Kay, 499 U.S. at 435-36.

The Court further found that "the overriding" purpose of the statute was to obtain "independent counsel for victims of civil rights violations" to "ensur[e] the effective prosecution of meritorious claims." Id. at 437. Permitting a pro se attorney-plaintiff to obtain fees was held not to serve this purpose because a pro se attorney "is deprived of the judgment of an independent third party in framing the theory of the case, evaluating alternative methods of presenting evidence, cross examining hostile witnesses, formulating legal arguments, and in making sure reason, rather than emotion, dictates the proper tactical response to unforseen developments in the court room." Id. The Kay Court concluded:

> A rule that authorizes awards of counsel fees to pro se litigants -- even if limited to those who are members of the bar -- would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf. The statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case.

Id. at 438.

In the wake of Kay, two of our sister circuits have found the Kay Court's rationale regarding attorney-litigants to be

applicable outside the § 1988 context; in both of these cases, the courts ruled that attorneys who successfully represent themselves in Freedom of Information Act claims cannot recover fees under that statute's fee-shifting provision. Burka v. United States Dep't of Health & Human Servs., 142 F.3d 1286, 1290 (D.C. Cir. 1998); Ray v. United States Dep't of Justice, 87 F.3d 1250, 1252 (11th Cir. 1996). No circuit, however, has dealt with a Kay-based challenge to fees for services of an attorney in successfully representing his or her own child in an IDEA claim. The Board maintains that the attorney-parent in an IDEA case "is, in fact, a pro se plaintiff for attorneys' fees purposes" and that Kay thus prohibits an attorney-parent from obtaining an award of fees under the IDEA.

The Board argues that certain statutory language supports its view that an attorney-parent's representation of his child in IDEA proceedings actually constitutes pro se representation. The IDEA undeniably establishes numerous parental rights. Parents are included in the "team" that determines a disabled child's appropriate "individualized education program" under the Act. 20 U.S.C.A.§ 1414(a)(20). No evaluation or reevaluation of a child can be made without obtaining parental consent. Id. §§ 1414(a)(1)(C)(iii), 1415(b)(1)(c). Moreover, "[a]ny state educational agency" that receives IDEA funds must establish . . . procedures . . . to assure that children with disabilities and their parents or guardians are guaranteed procedural safeguards." Id. § 1415(a) (emphasis added). These procedural safeguards include "an opportunity for the parents or guardian of a child with a disability to examine all relevant records," the provision of"written prior notice to the parents or guardian of the child" of certain information, and the right of the "parents or guardian [to] an impartial due process hearing" on complaints pertaining to the treatment of the child's case under the Act. Id. § 1415(b). (emphasis added).

Contrary to the Board's contention, however, we do not believe that the IDEA's provision of rights to parents means that an attorney-parent actually represents himself when he pursues IDEA services for his child. Plainly, the focus of the IDEA is the educational needs of the disabled child, not the parents. State officials are charged with formulation of an individualized education plan for the child, not the parents. The adequacy of such a plan is determined by how appropriately it meets the needs of the child, not the parents. Even the wording of the IDEA fee-shifting provision supports the notion that the child is the focus of the IDEA, by providing fees "to the parents of a child or youth with a disability who is the prevailing party ." 20 U.S.C.A. § 1415(e)(4)(B) (emphasis added).

Though parents have some rights under the IDEA, the child, not the parents, is the real party in interest in any IDEA proceeding. The references to parents are best understood as accommodations to the fact of the child's incapacity. That incapacity does not collapse the identity of the child into that of his parents. Recognizing that parents and children are distinct legal entities under the IDEA, the Second and Eleventh Circuits have recently held that parents who are not attorneys may not appear pro se in court on behalf of their children in IDEA cases. See Wegner v. Canastota Cent. Sch. Dist., 146 F.3d 123 (2nd Cir. 1998); Devine v. Indian River County Sch. Bd., 121 F.3d 576, 581-82 (11th Cir. 1997), cert. denied , 118 S. Ct. 1040 (1998). For these reasons, we cannot agree, as the Board urges, that Mr. Doe is acting pro se in pursuing his son's IDEA claim, in the same fashion as Mr. Kay was in advancing his own civil rights claim. Thus, Kay v. Ehrler does not precisely parallel this case.

Yet Kay clearly does have relevance here. After all, the central thrust of Kay is that fee-shifting statutes are meant to encourage the effective prosecution of meritorious claims, and that they seek to achieve this purpose by encouraging parties to obtain independent representation. Like attorneys

appearing pro se, attorney-parents are generally incapable of exercising sufficient independent judgment on behalf of their children to ensure that "reason, rather than emotion" will dictate the conduct of the litigation. Kay , 499 U.S. at 437. Certainly the danger that a child's meritorious claim will be ineffectively prosecuted by an irrationally emotional attorney-parent is at least equal to the danger that the meritorious claim of a pro se civil rights plaintiff, who is also a lawyer, will be bungled without the assistance of an independent attorney.

Indeed, although Mr. Doe obtained an excellent result for Tom -- complete reimbursement for the Lovaas program -- and although we do not in any way denigrate his care and effort in representing his son, this case illustrates the difficulties of encouraging inexperienced attorney-parents, via a statutory fee award, to represent their own children in IDEA proceedings. Because Mr. Doe failed to provide state officials with timely notice of his proposed witness list prior to the initial administrative due process hearing, the Does were not permitted to present the testimony of those witnesses at the hearing and the hearing examiner rejected their claim. If Mr. Doe had provided timely notice of the witness list, all subsequent proceedings in this case might, as the Does themselves note, have "been avoided altogether." Brief of Appellant at 4 n.1.[1] An attorney more familiar with the relevant procedures might well have obtained relief for Tom more quickly and at far less cost. Similarly, although the Does seek costs and pre- and post-judgment interest on appeal, they did not properly advance or preserve these rights in the district court. More experienced counsel would

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[1] The Does provided the Board with four, rather than the required five, days notice of the proposed witness list. We do not suggest that the hypertechnical insistence of the Board's attorney on five days notice is to be applauded. Such conduct seems unnecessary and graceless when dealing with inexperienced opposing counsel and a government program designed to benefit disabled children. However, graceless or not, the Board's counsel did act within his rights.

likely have alleged the right to interest in the complaint and sought costs pursuant to 20 U.S.C.§ 1415(e)(2).

Indisputably, disabled children pursuing IDEA claims merit the very best representation. In their brief, the Does note that

> [t]he IDEA was enacted to develop a mechanism for providing disabled children with an opportunity to become functional in our society. No one is more likely to lead the fight for those children than a parent who has been scarred by a school district that refuses to comply with the IDEA. There is no reason to compound a child's handicap simply because his parent is an attorney.

Brief of Appellants at 9. We completely agree. Loving parents, like the Does will of course "fight" for their children -- with or without a statutory award of fees for their services. To permit an attorney-parent to recover statutory fees for representing his child in IDEA proceedings is thus not necessary to ensure a parent's efforts on behalf of his child, but it might well lessen the chance that a disabled child would have the benefit of legal services from an independent third party. In this way, such a holding would "compound" the "child's handicap simply because his parent is an attorney." Precisely because disabled children deserve independent legal services, the IDEA fee-shifting provision should be read to encourage parents to obtain independent legal services. Indeed, courts must take special care to protect the interests of children, given that an "infant is always the ward of every court wherein his rights or property are brought into jeopardy, and is entitled to the most jealous care that no injustice be done to him." Wegner, 146 F.3d at 125 (quoting Johns v. County of San Diego, 114 F.3d 874, 877 (9th Cir. 1997).

In sum, although an attorney-parent's representation of his child is not pro se representation, such that Kay is not on "all fours" with this case, much of the rationale articulated in Kay does apply here. That rationale provides a clear basis for invoking the judicially created special circumstances doctrine. In the context of other fee-shifting provisions, e.g., those in 42 U.S.C. § 1988 and Title VII of the Civil Rights Act of 1964, the Supreme Court has recognized that although a prevailing party "should ordinarily recover an attorney's fee," "special circumstances" can render "such an award unjust." See, e.g., Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) (quoting Newman v. Piggie Park Enters. Inc., 390 U.S. 400, 402 (1968)) (§ 1988); Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975) (Title VII) (dicta). Although the Court has not discussed the special circumstances doctrine in connection with the IDEA fee-shifting provision, the legislative history indicates that Congress intended courts to interpret it as they have § 1988 and Title VII. See S. Rep. No. 99-112, at 13-14 (1985), reprinted in 1986 U.S.C.C.A.N. 1798, 1803-04.

Courts have universally recognized that this "special circumstances" exception is very "narrowly limited." See, e.g., Bonnes v. Long, 599 F.2d 1316, 1318 (4th Cir. 1979), overruled on other grounds by S-1 & S-2 v. State Bd. of Educ., 21 F.3d 49, 51 (4th Cir. 1994). Only on rare occasions does a case present such circumstances, see, e.g., Chastang v. Flynn & Emrich Co., 541 F.2d 1040, 1044-45 (4th Cir. 1976), and we have uncovered no case in which any circuit has found a basis for the special circumstances exception in a situation similar to that at hand.[2] However, given a parent's

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[2] Prior to Kay, the Ninth Circuit suggested that determination of whether "special circumstances" exist in an IDEA case involves examination of "two factors: (1) whether awarding fees would further the congressional purpose in enacting" IDEA and "(2) the balance of the equities." Abu-Sahyun v. Palo Alto Unified Sch. Dist., 843 F.2d 1250, 1253 (9th Cir. 1988). Neither the Supreme Court nor this court has embraced this two-part test in subsequent IDEA cases and we decline to do so here. This "test" contains no real standards and provides no

special and close relationship with his or her child, we believe that Kay does provide a basis for invoking the narrow special circumstances exception here. We note that the district judge in this case, another distinguished district judge in this circuit, and the Indiana Supreme Court have reached a similar conclusion. See Rappaport v. Vance, 812 F. Supp. 609 (D. Md. 1993), appeal dismissed, 14 F.3d 596 (4th Cir. 1994); accord, Miller v. West LaFayette Community Sch. Corp., 665 N.E.2d 905 (Ind. 1996).

We recognize, of course, that other judgments could be made as to how the policy interest in ensuring "effective prosecution of meritorious claims" is best served. For example, reimbursing pro se attorney-plaintiffs, who have prevailed in difficult, unpleasant cases when they can demonstrate that they could not obtain other representation, could well be found to further this interest. But, nothing in Kay suggests that the difficulty of a case or the failure to find other counsel provide a ground for awarding fees to a prevailing pro se attorney-plaintiff. Moreover, contrary to the Does' suggestion, the Kay Court specifically refused to base its rationale on a need to eliminate abusive or meritless claims. Thus, we cannot deduce that when an attorney advocates a nonabusive claim, a different result is mandated. Instead, the Kay Court held that encouraging independent representation by prohibiting statutory awards to pro se attorney-plaintiffs furthered the fee-shifting statute's purpose of encouraging the effective prosecution of meritorious claims. 499 U.S. at 437. In accord with that holding, we conclude that special circumstances bar an award of fees for services performed by an attorney-parent who represents his or her child in IDEA proceedings.

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legitimate reason for departing from the usual rule of awarding reasonable fees to prevailing plaintiffs under fee-shifting statutes.

III.

The district court's judgment is, in all respects,

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

M.E., et al.

v.

BOARD OF EDUCATION OF BALTIMORE COUNTY

Civil Action WMN-96-3734
Entered: December 23, 1997

MEMORANDUM

Before the Court are cross motions for partial summary judgment. Paper Nos. 8 (Defendant's) & 11 (Plaintiffs'). Upon a review of the motions and the applicable case law, the Court determines that no hearing is necessary (Local Rule 105.6) and that Defendant's motion will be granted, and Plaintiffs' denied.

This dispute arises out of the efforts of Plaintiffs M.E. and P.E. to obtain an appropriate educational program for their son, Plaintiff C.E. Plaintiffs initially received an adverse decision from a due process hearing before a Hearing Officer for Defendant Baltimore County Board of Education. They then appealed that decision to an appeal panel under the auspices of the Maryland Office of Administrative Hearings. The appeal panel ruled in Plaintiff's favor, finding that Defendant had failed to provide C.E. with a "free appropriate public education" as mandated under the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et seq. ("IDEA").

As a remedy, the panel ordered that Plaintiffs be reimbursed the costs which Plaintiffs incurred in providing a program of therapy for C.E. The parties have agreed that the appropriate amount for this reimbursement is $10,421.36. Defendant has also agreed that Plaintiffs are entitled to recover an additional $2,012.50 for the costs associated with obtaining expert witnesses in the administrative proceedings.

Where the parties differ is as to the issue of Plaintiffs' entitlement to attorney's fees under 20 U.S.C. 1415(e) (3) (B) .[1] Under that provision, attorney's fees are typically awarded to the parent or guardian of a disabled child who prevails in a special education dispute. In this instance, however, the attorney advocating for the interests of the child was Plaintiff P.E., C.E.'s father and a member of the Maryland bar.

In Rappaport v. Vance, 812 F. Supp. 609 (D. Md. 1993), this Court addressed precisely the issue raised in these motions, i.e., whether pro se litigants who are attorneys are entitled to attorney fees under the IDEA. Relying on the Supreme Court's reasoning in Kay V Ehrler, 499 U.S. 432 (1991), which addressed the same issue in the context of Title VII actions, this Court concluded that "Congress' purpose in enacting IDEA is not advanced, and fairness is not served, by awarding fees to the father of a disabled child simply because he is an attorney." 812 F. Supp. at 612. See also Miller v. West Lafayette Community School

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[1] The parties also differ greatly as to the amount of attorney's fees that could be awarded should the Court decide that fees were recoverable. While the Court need not reach that issue, the Court notes that the appropriate figure falls much closer to Defendant's calculation of $28,000 than Plaintiffs' calculation of over $110,000. In addition to time entries that are clearly inappropriate, such as a half hour to "consult" with his wife and another half hour designated simply as "to post office," the Court finds P.E.'s hourly rate unsupportable. P.E. acknowledges that his hourly rate at the firm in which he was employed at the outset of this litigation was $62.50, yet he is asking this Court to compensate him at an hourly rate of $200.00.

Corporation, 665 N.E.2d 905 (Ind. 1996) (following Rappaport).

Plaintiffs acknowledge that under Rappaport, their claim for attorney's fees would be denied. In urging this Court to reconsider Rappaport, Plaintiffs rely primarily on the Indiana Court of Appeals decision that was reversed in Miller. Miller v. West Lafayette Community School Corporation, 645 N.E.2d 1085 (Ind. Ct. App. 1995). Having carefully considered the criticisms raised by Plaintiffs and the Indiana lower appellate court, this Court determines that the reasoning of Rappaport is sound. While there may be ways in which the award of fees to a parent-attorney might advance the goals of the IDEA, the Court is of the opinion that, all things considered, the congressional purpose in enacting the IDEA is best served by denying the award of fees in situations such as this.

For the reasons more fully set out in Judge Young's decision in Rappaport, the Court will deny Plaintiffs' request for attorney's fees. Because the recoverability of fees is the only unresolved issue in this litigation, the Court will issue a final order granting judgment in favor of Plaintiffs in an amount equal to the amounts stipulated by the parties for educational costs and expert costs.

/s/ William M. Nickerson
United States District Judge

Dated: December 23, 1997.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

M.E., et al.

v.

BOARD OF EDUCATION OF BALTIMORE COUNTY

Civil Action WMN-96-3734
Entered: December 23, 1997

ORDER

In accordance with the foregoing Memorandum and for the reasons stated therein, IT IS this 23rd day of December, 1997, by the United States District Court for the District of Maryland,

ORDERED:

1. That Defendant's Motion for Partial Summary Judgment (Paper No. 8) is GRANTED;
2. That Plaintiffs' Claim for Attorney's Fees (Paper No. 11) is DENIED;
3. That the stipulated costs of therapy in the amount of $10 421.36 shall be reimbursed to Plaintiffs by Defendants;
4. That expert witness fees incurred in connection with the preparation and presentation of Plaintiffs' case before the Maryland Office of Administrative Hearings in OAH #95-MSDE-BCNY-23-29 in the amount of $2,012.50 shall be paid by Defendants;

5. That any and all prior rulings made by this Court disposing of any claims against any parties are incorporated by reference herein and this order shall be deemed to be a final judgment within the meaning of Fed. R. Civ. p. 58;
6. That this case is hereby CLOSED; and
7. That the Clerk of the Court shall mail copies of the foregoing Memorandum and this Order to all counsel of record.

/s/ William M. Nickerson
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-1075
CA-96-3734-WMN

ANN DOE AND JOHN DOE, parents and next friends of TOM DOE,

Plaintiffs - Appellants

v.

BOARD OF EDUCATION OF BALTIMORE COUNTY, a Body Corporate and Politic of the State of Maryland; ANTHONY G. MARCHIONE, Officially, Superintendent

Defendants - Appellees

FILED: January 5, 1999
ENTERED: January 5, 1999

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

Supreme Court, U.S.
FILED
MAY 6 1999
OFFICE OF THE CLERK

No. 98-1613

In The Supreme Court of the United States

October Term 1998

ANN DOE AND JOHN DOE,
parents and next friends of TOM DOE,
Petitioners,

v.

BOARD OF EDUCATION OF BALTIMORE COUNTY,
a Body Corporate and Politic of the State of Maryland; ANTHONY G. MARCHIONE, Officially, Superintendent,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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1998

QUESTION PRESENTED

Whether a parent who is also an attorney representing his own child, who prevails on the merits of a due process hearing conducted pursuant to the Individuals With Disabilities Education Act, 20 U.S.C. § 1400 et seq. (hereinafter, "IDEA"), is entitled to attorneys' fees pursuant to Section 1415(e)(4)(B) of that statute.

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Respondents Board of Education of Baltimore County (hereinafter, "the Board") and Anthony G. Marchione, Superintendent of Schools, by their undersigned counsel, oppose the Petition for a Writ of *Certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 165 F.3d 260. The opinion of the district court is unpublished and reprinted at App. A-12 through A-16 of the Petitioner's Petition for Writ.

JURISDICTION

The judgment of the Court of Appeals was entered on December 10, 1998 (Pet. App. 11). Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the Court of Appeals on January 5, 1999. The petition for a writ of certiorari was filed on April 7, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of IDEA are set forth at Pet. 1-2.

STATEMENT OF THE CASE

Petitioners properly state in their Petition that their son, Tom Doe, who is currently 7 years of age, was diagnosed as suffering from a disability known as autism, and that as a result of research conducted by Tom's mother the Petitioners determined that they wished for Tom to receive services provided by the Respondents which differed

in kind and in intensity from those services which the Respondents were prepared to provide for Tom. As the Petition explains, the Petitioners demanded that Respondents fund a program known as "Lovaas" therapy that involves discrete and intensive behavior modification which is intended to increase the communicative and interpersonal skills for certain autistic children. Respondents, however, believed that the "Lovaas" program was of questionable efficacy and were instead fully prepared to offer the Petitioners a different program with comparable types of services. Petitioners were dissatisfied with Respondents' proffered services for their child, and therefore proceeded to a due process hearing before a local hearing officer, pursuant to their rights under the IDEA, 20 U.S.C. § 1415(B). The local hearing officer ruled in Respondents' favor, finding and concluding that Respondents had offered Tom a sufficient program in compliance with the requirements of IDEA that he be provided with a "free appropriate public education." 20 U.S.C. §§ 1401(a)(18) and 1412(2)(B).

Pursuant to Maryland's administrative appeal process then in place, the Petitioners appealed the decision of the local hearing officer to a 3-member hearing review board which was convened under the auspices of the Maryland Office of Administrative Hearings. Following a *de novo* hearing, that body reversed the decision of the local hearing officer and ordered Respondents to reimburse the Petitioners for expenses they had incurred in providing Tom with "Lovaas" therapy in their home prior to and during the course of the administrative dispute. In response to a request by the Petitioners that, as prevailing parties under IDEA, they be afforded their attorneys' fees, the hearing review board concluded that, although unauthorized to make such awards -- that being strictly within the province of the courts, pursuant to 20 U.S.C. § 1415(e)(4)(B) -- the fact that Tom Doe was represented by his own father, who happened to be an attorney admitted to practice in the State of Maryland, precluded an award of fees, pursuant to the sole ruling on

this point made by the U.S. District Court for the District of Maryland, in Rappaport v. Vance, 812 F. Supp. 609 (D. Md. 1993), appeal dismissed 14 F.3d 596 (4th Cir. 1994).

A. THE DISTRICT COURT'S RULING

Still insistent upon obtaining attorneys' fees -- which Petitioners calculated at $110,000.00 (Pet. App. 13) -- the Petitioners sought enforcement of their claim in the United States District Court for the District of Maryland. Included in Petitioners' fee petition to the United States District Court were line items seeking reimbursement from the Respondents for such matters as "consultations" between John Doe the husband-father-attorney and his "client" Ann Doe, who happened to be John Doe's wife. A "client fee agreement" between John Doe and his wife Ann was submitted to the District Court, which identified Tom's mother, rather than Tom, as the "client."

In a Memorandum Opinion and Order issued on December 27, 1997, Judge William M. Nickerson of the District Court rejected the Petitioners' claim for attorneys fees. Relying upon the District Court's prior ruling in Rappaport v. Vance, *supra*, the Court concluded that "[w]hile there may be ways in which the award of fees to a parent-attorney might advance the goals of the IDEA, the Court is of the opinion that, all things considered, the congressional purpose in enacting the IDEA is best served by denying the award of fees in situations such as this." (Pet. App. 14.)

B. THE DECISION OF THE COURT OF APPEALS

On appeal, the Court of Appeals for the Fourth Circuit affirmed. In so ruling, the Court largely relied upon this Court's decision in Kay v. Ehrler, 499 U.S. 432, 111 S. Ct. 1435 (1991), which "held that a *pro se* plaintiff who is an attorney cannot be awarded attorney's fees under the fee-

shifting provisions of the Civil Rights Fees Awards Act, which contains language similar to the IDEA provision. *See* 42 U.S.C. § 1988(b) (West Supp. 1998) . . . . The Kay court reasoned that the term 'attorney' in the fee-shifting provision 'assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under § 1988.' Kay, 499 U.S. at 435-36, 111 S. Ct. 1435." 165 F.3d at 262.

While concluding that the interests of parents and children under IDEA are sufficiently different and distinct so as to negate the notion that a parent who represents his or her child is effectively *pro se*, 165 F.3d at 262-263, the Court of Appeals nonetheless went on to find that, "[l]ike attorneys appearing *pro se*, attorney-parents are generally incapable of exercising sufficient independent judgment on behalf of their children to ensure that 'reason, rather than emotion' will dictate the conduct of the litigation." 165 F.3d at 263, *citing* Kay, *supra*, 499 U.S. at 437, 111 S. Ct. at 1435. As the Court then observed:

> Certainly the danger that a child's meritorious claim will be ineffectively prosecuted by an irrationally emotional attorney-parent is at least equal to the danger that the meritorious claim of a pro se lawyer, will be bungled without the assistance of an independent attorney.

165 F.3d at 263.

The Court then proceeded to describe the very problems encountered by the parent-attorney in this case who, due to his utter lack of competence and understanding of the dynamics of the nation's special education laws, failed to timely submit supporting documents and a witness list to Respondents prior to his initial due process hearing, which precluded him from introducing evidence under the law's

procedural regulations. Thus, the Court reasoned, he was compelled to retry the case before another adjudicatory authority, thereby prolonging the proceedings and increasing both Petitioners' and Respondents' resultant costs of litigation. His admitted unfamiliarity with the Federal Rules of Civil Procedure further resulted in his failure to "preserve" his right in District Court to seek pre- and post-judgment interest from the District Court. Id. "More experienced counsel," opined the Court of Appeals, "would likely have alleged the right to interest in the complaint and sought costs pursuant to 20 U.S.C. § 1415(e)(2)." Id. Petitioner's pitiful lack of experience as a special education litigator pointed out the very reason why the statute contained a fee-shifting provision in the first place, i.e., to encourage parents, including those who happen to practice law, to obtain the services of specialized attorneys knowledgeable in this highly complex field of jurisprudence.

The Court of Appeals next looked at the fact that loving parents who care deeply about their own children, including attorneys, need no incentive in the form of attorneys' fees in order to "ensure a parent's efforts on behalf of his child, but" awarding fees to a parent-litigant "might well lessen the chance that a disabled child would have the benefit of legal services from an independent third party. In a way," held the Court of Appeals, awarding attorneys fees to parents "would 'compound' the "child's handicap simply because his parent is an attorney.'" 165 F.3d at 264. Essentially, the Court expressed a concern that children's rights would be compromised by emotion-laden, not fully competent attorney-parents seeking to represent their interests -- the precise facts confronting the Court in this case. Accordingly, the Court of Appeals denied Petitioners' fee request, concluding:

> [T]he Kay Court held that encouraging independent representation by prohibiting statutory awards to *pro se* attorney-plaintiffs

> furthered the fee-shifting statute's purpose of encouraging effective prosecution of meritorious claims.

165 F.3d at 265, *citing* Kay, *supra*, 499 U.S. at 437, 111 S. Ct. at 1435.

ARGUMENT

I.

The Petitioner's Petition is largely an indictment not of the sound reasoning of the District Court and Court of Appeals in this case, but rather, of public schools in general. Painting the Respondents as greedy, blind bureaucrats with little interest in their son's recovery from the ravages of autism (*see, for instance,* Pet. 6, 26) , the Petitioners essentially urge this Court to grant their Writ in order to insure that autistic children will someday be "cured," rather than ignored and mistreated by public educators.

Of course, one must make a quantum leap in order to discern any causal connection between the Petitioners' receipt of attorneys' fees and the dramatic changes in public schools' approaches to the education of autistic children insisted upon by the Petitioners. Petitioners' repetitive contention that the direct result of the success of their administrative appeal was a "systemic change wherein the school district began offering the child's educational program to other similarly situated children suffering from autism" (Pet. 14), is entirely unsupported by any record evidence, as reflected in the absence of any reference to the record following such a sweeping assertion. Even if that were the case -- which it markedly is not -- the Does cannot nonetheless justify a fee award in light of this Court's ruling in Kay v. Ehrler, *supra*.

In Kay, a law enacted by the State of Kentucky prohibited the plaintiff, an attorney representing himself,

from appearing on the ballot as a candidate for President of the United States. He successfully sued the State, obtaining a ruling from a federal court that the law was unconstitutional. Nonetheless, Kentucky first repealed, then reenacted an identically-worded statute, once again forcing the plaintiff to go back to court, where he obtained the same relief. This time, the plaintiff requested attorneys' fees, which were denied him even though it was apparent that the State, in an action bordering on bad faith, had reenacted a bad law which had the effect of chilling the exercise of citizens' constitutional rights to seek higher office. Despite this compelling result, this Court was loath to award the plaintiff his attorneys' fees under 42 U.S.C. § 1988. This Court's rejection of the plaintiff's fee request was predicated upon the very same reasoning advanced by the Court of Appeals in the instant case, that is:

> The question then is whether a lawyer who represents himself should be treated like other pro se litigants or like a client who has had the benefit of the advice and advocacy of an independent attorney.
>
> In the end, we agree . . . that the overriding statutory concern [in the fee-shifting law] is the interest in obtaining independent counsel for victims of civil rights violations. . . . [W]e think Congress was interested in ensuring the effective prosecution of meritorious claims.
>
> Even a skilled lawyer who represents himself is at a disadvantage in contested litigation. Ethical considerations may make it inappropriate for him to appear as a witness. He is deprived of the judgment of an independent third party in framing the theory

> of the case, evaluating alternative methods of presenting the evidence, cross-examining hostile witnesses, formulating legal arguments, and in making sure that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom. . . .

499 U.S. at 435, 437, 111 S. Ct. at 1435.

Thus, contrary to Petitioners' argument, this Court in Kay was deeply concerned, not so much with questions of whether the plaintiff seeking fees for himself was unable to secure other counsel (Pet. 12-13), but with the lack of objectivity inherent in attorneys who represent themselves. Given this Court's well-founded apprehension that "reason," rather than "emotion," would "dictate the proper tactical response" to developments in a case, 499 U.S. at 437, 111 S. Ct. at 1435, thus sacrificing judgment that can only be truly independent if provided by a "third party," *Id.*, the Court of Appeals below quite reasonably concluded that a parent's emotion and lack of objectivity when it comes to his or her own child is no less evident, and indeed, may be even more intense. A parent's natural instincts to protect his or her child, at any and all costs, cannot help but leave reason behind, as reflected in Petitioners' resort to barely comprehensible rhetoric in its Petition to this Court about "Russian Roulette" and saving children's lives (Pet. 6, 26) in lieu of a cogent legal argument which is best left up to an independent, unemotional third party, rather than Tom's own flesh and blood.

II.

One particular concern which the Court of Appeals failed to address, but which looms large in this area of the law should this Court grant Petitioners' Petition and reverse the ruling of the Court of Appeals, is the very real risk that parent-attorneys, armed with the power to seek attorneys' fees upon prevailing in a due process dispute with their local school system over the education of their children, would make a virtual career of disputing their child's educational services each and every year, from grades kindergarten through age 21 when services under IDEA finally come to an end. Thus, in essence, a law interpreted so as to permit parent-attorneys to recover their fees could invite over a decade of litigation for each child, motivated not necessarily by the best interests of the child, but instead by the expectation that from time to time the parent-attorney will "prevail" and obtain attorneys' fees, courtesy of the community's taxpayers. Thus, there then becomes a genuine incentive under the law to litigate meritless claims, hoping that one or more such claims will eventually result in a "win" warranting a significant fee award.

Unlike the arrangement John Doe made with his wife Mary, most bona fide independent attorneys who represent parents and their children in IDEA litigation with our nation's public schools are not retained on a "contingency" basis, but instead charge their clients an hourly fee for their services, subject only to reimbursement in the event they eventually prevail and obtain a fee award pursuant to 20 U.S.C. § 1415(e)(4)(B). But what parent, who also happens to practice law, is going to enter into such an arm's length relationship with his or her own spouse and/or child, thereby collecting a fee on an hourly basis subject only to reimbursement from the local school district if the case proves successful? Respondents doubt that Mary Doe had any intention of paying her own husband a fee to represent

her, regardless of the outcome of the due process hearing in this case.

Petitioners seek to extend the reasoning of the Court of Appeals to an absurd end when they contend that, applying that reasoning, any attorney whose independence might be in question risks being denied fees should he or she prevail in an IDEA proceeding. (Pet. 18-19.) The Court of Appeals nowhere suggests an "objectivity" or "independence" test in ascertaining a litigant's entitlement to attorneys' fees. It simply concluded that a parent of a special education student was prohibited from seeking attorneys' fees. This clear and certain bright line test is neither unreasonable nor unfair, given that a parent needs no incentive to defend his or her child when he or she perceives that child is disadvantaged by a public school special education decision.

III.

In order to warrant granting the Petitioners' Petition in this case, this Court must first determine whether or not the issue is deemed worthy of review. One criterion frequently applied by this Court to determine such "cert-worthiness" -- the existence of a conflict in the Circuit Courts of Appeals -- is simply not present here. To the contrary, Petitioners concede that no other federal appeals court has squarely addressed the issue facing the Court in this case. (Pet. 17.) Indeed, the only other court of appeals that has addressed a similar issue -- i.e., whether an attorney-litigant may recover attorneys fees in his own cause, in that case a Freedom of Information Act lawsuit -- reached the very same result. In Burka v. United States Department of Health and Human Services, 142 F.3d 1286 (D.C. Cir. 1998), the Court of Appeals for the D.C. Circuit expanded Kay to include work performed by a pro se attorney-litigant on behalf of an "undisclosed client," or "work performed by other attorneys on the case where the other attorneys worked

in the attorney-litigant's law firm." 142 F.3d at 1292 (Pet. 17).

Petitioners' intimation as to the existence of a conflict between the Fourth Circuit and the Ninth Circuit (Pet. 10-12) over the extent to which exceptions may be made to the general rule awarding attorneys' fees to prevailing IDEA claimants is not only misplaced, but highly misleading. Both cases cited by the Petitioners -- Collins v. Chandler Unified School District, 644 F.2d 759 (9th Cir. 1981), and Abu-Sahyun v. Palo Alto Unified School District, 843 F.2d 1250 (9th Cir. 1988) -- **predated** this Court's decision in Kay, *supra*. In any event, the Abu-Sahyun case involved a question of fairness in denying attorneys' fees to a litigant who had, in fact, hired independent outside counsel, based upon the lower court's refusal to retroactively apply the then recently-enacted fee-shifting provision of the statute to a prevailing party.

Since this Court's ruling in Kay, *supra*, only 2 courts, besides the Court of Appeals in the case presently before this Court, have ruled on the subject at all in an IDEA case. In both cases, the courts ruled consistently to reject the fee petition of parent-attorneys on behalf of their children. One such case was the Maryland U.S. District Court's ruling in Rappaport v. Vance, *supra*. The other decision was rendered by the Indiana Supreme Court in Miller v. West Lafayette Community School Corporation, 665 N.E.2d 905 (Ind. 1996). In reaching the very same result as that reached by the Court of Appeals in the instant case, the Indiana Supreme Court in Miller equally embraced this Court's concern in Kay, *supra*, that in all fee-shifting statutes, including IDEA, "[t]he statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case." 665 N.E.2d at 907, *citing* Kay, *supra*, 499 U.S. at 436-38, 111 S. Ct. at 1437-38.

In short, not a single federal district or appeals court has chosen to take issue with the applicability of this Court's

Kay decision to facts such as those presented in the case at bar. Rather, the Court of Appeals decision in this case is consistent with virtually identical rulings in the two reported cases to address this issue, Rappaport and Miller, *supra*. Thus, there is no conflict between the circuits warranting resolution by this Court.

Nor does this case present questions of constitutional import warranting this Court's time and attention. What we have in this case is merely a challenge by Petitioners to the reasonable interpretation by the District Court and Court of Appeals of statutory language. Less than 2 years ago — after both the Indiana Supreme Court's ruling in Miller, *supra*, and the District Court of Maryland decision in Rappaport v. Vance, *supra* — Congress reauthorized the IDEA. Public Law 103-392, 108 Stat. 3518 (1997). Cognizant of this line of cases, with its reauthorization of the statute Congress could surely have amended the provisions governing attorneys' fees and costs so as to acknowledge the right of parent-attorneys to nonetheless obtain such fees from public school systems upon prevailing on the merits of a due process dispute under IDEA. That Congress chose not to amend the statute in that respect no doubt reflects its satisfaction with the reasoning in both Miller and Rappaport, which logically applied this Court's rationale in Kay v. Ehrler, *supra*, to IDEA litigation initiated by parent-attorneys.

Particularly where, during a significant overhaul of the IDEA statute, Congress had the opportunity to amend the statute to address Petitioners' concerns, yet failed to do so, it is not the job of this Court to second guess congressional intent. To the contrary, Congress' willingness to leave the attorneys' fees provision contained in IDEA virtually unchanged in this regard reflects its effective endorsement of the reasoning of those pre-Reauthorization decisions. See Lindahl v. Office of Personnel Management, 470 U.S. 768, 783, n.15, 105 S. Ct. 1620, 1629, n.15 (1985); Albemarle Paper Co. v. Moody, 422 U.S. 405, 414, n.8, 95 S. Ct. 2362,

2370, n.8 (1975) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change."); Lorillard v. Ponds, 434 U.S. 575, 580-581, 98 S. Ct. 866, 869-870 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").

This thoroughly logical means of discerning congressional intent in the reenactment of a statute which retained language that was the subject of a dispute over interpretation was acknowledged by this Court in an attorneys' fee decision brought under yet another fee-shifting statute. In Fogerty v. Fantasy, Inc., 510 U.S. 517, 527, 114 S. Ct. 1023, 1030 (1994), this Court addressed statutory language contained in fee-shifting legislation similar to IDEA -- in that case, referring to Christianburg Garment Co. v. EEOC, 434 U.S. 412, 98 S. Ct. 694 (1978), Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) -- which, like 20 U.S.C. § 1415(e)(4)(B), leaves the award of a "reasonable attorney's fee" within the sound discretion of the District Court. ("[T]he court **may** also award a reasonable attorney's fee to the prevailing party as part of the costs"; emphasis added.) Given that this Court had previously noted in Flight Attendants v. Zipes, 491 U.S. 754, 758, n.2, 109 S. Ct. 2732, 2735, n.2 (1989), that "fee-shifting statutes' similar language is a 'strong indication' that they are to be interpreted alike," the Court of Appeals' application of this Court's reasoning in Kay, *supra*, to the facts of this case, even though derived from a different statute, was both reasonable and consistent with this Court's intent.

There is clearly no need for this Court to dictate to the lower federal courts the manner in which they are to exercise their discretion under fee-shifting statutes such as IDEA so as to deny attorneys' fees to attorney-litigants who, either as *pro se* civil rights litigants or as parents of children

with special needs, need no incentive to serve as advocates under these laws. The Court of Appeals in this case reached this logical and sensible conclusion, which need not be disturbed by this Court.

CONCLUSION

The decision of the Court of Appeals does not constitute a departure from precedent, nor is there a conflict among the Circuits warranting Supreme Court review. Neither does the decision of the Court below reflect an unreasonable or unsupportable interpretation of the attorneys' fee provisions of IDEA; the Court simply applied this Court's interpretation of an analogous statute to the facts and circumstances of this case.

The issue herein is of importance only to the Petitioners and a handful of parent-attorneys of special education students whose efforts would be best spent securing the services of competent, truly independent counsel to represent the interests of their children in disputed proceedings under IDEA, rather than undertaking the representation of their own children (whether or not they have sufficient expertise in this highly specialized field) in hopes of reaping a substantial fee at the end of the legal process. This, of course, presents no reason for granting review. Indeed, it is noteworthy that not a single disability or children's rights group has seen fit to join the Petitioners as *amici curiae* either in the Court below, or before this Court.

For the reasons set forth above, we submit that the Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

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